90-906

No. 90-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,
Petitioners,

v.

CITIZENS FOR THE ABATEMENT OF AIRCRAFT NOISE, INC., *et al.*,
Respondents,

UNITED STATES OF AMERICA,
Intervenor.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1987, after years of attempts, the federal Executive and Congress, together with the executives and legislatures of the Commonwealth of Virginia and the District of Columbia, united in devising and implementing a successful solution to a longstanding regional transportation problem. Washington National and Washington Dulles International Airports were long owned and controlled by the federal government. While local residents, airport users, airlines, and the airports' owner (the federal government) all recognized the increasing need for a local voice in the governance of the Washington airports, agreement on how to accomplish this change could not be easily or quickly reached.

To overcome this lack of consensus, Secretary of Transportation Elizabeth Dole appointed an advisory commission chaired by former Virginia Governor Linwood Holton. This Commission recommended that control of the airports be transferred to a regional airport authority with a Board of Directors composed of Washington area residents. Virginia and the District of Columbia each accepted the Commission's recommendations and enacted legislation creating an independent regional authority. Congress thereafter authorized the transfer of the airports to the nonfederal authority. One condition of the transfer was that the nonfederal authority establish and appoint a nine-person review board composed of Members of Congress to serve in their individual capacities representing users of the airports. Virginia and the District of Columbia enacted legislation authorizing the authority to have a review board and the regional authority adopted Bylaws providing for the composition, appointment and powers of such board.

It is this carefully crafted airports governing structure that the decision below, by a 2 to 1 vote, holds unconstitutional. Therefore, the questions presented are:

1. Whether the federal separation of powers doctrine prohibits the Board of Directors of an independent, nonfederal airport authority from voluntarily agreeing in its lease of federal property, consistent with provisions in a federal statute, to establish a Board of Review pursuant to state law and to appoint thereto from proposed lists (and retain the power to remove) nine Members of Congress who will serve solely as representatives of airport users in their individual, non-congressional capacities.

2. Whether a constitutional claim is justiciable when relevant action has not been taken under the challenged statutory provision and the elimination of that provision would not redress the respondents' injury.

PARTIES TO THE PROCEEDINGS

Petitioners are the Metropolitan Washington Airports Authority and its Board of Review. The Metropolitan Washington Airports Authority is a nonfederal public body corporate and politic with no parent company or subsidiary.

Respondents are Citizens for the Abatement of Aircraft Noise, Inc., John W. Hechinger, Sr. and Craig H. Baab.

The United States of America exercised its statutory right to intervene in the court of appeals pursuant to 28 U.S.C. § 2403(a) (1988) because the constitutionality of an Act of Congress had been challenged.

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The Metropolitan Washington Airports Authority including its Board of Review hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals reversing the district court is not yet reported but is reprinted as Ap-

pendix ("App.") A at 1a.[1] The opinion of the district court is reported at 718 F. Supp. 974 (D.D.C. 1989), and is reprinted as App. C at 29a.

JURISDICTION

The opinion and judgment of the court of appeals were entered on October 26, 1990. The judgment was stayed by order of the court of appeals entered on December 6, 1990. App. B at 28a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

United States Constitution, Article I, Secs. 1; 6, cl. 2; 7, cl. 2 and 3; Article II, Secs. 1; 2, cl. 2; and Article IV, Sec. 3, cl. 2.

The Metropolitan Washington Airports Act of 1986, 49 U.S.C. §§ 2451-2461 (1988).[2]

1985 Va. Acts ch. 598 and 1987 Va. Acts ch. 665.

D.C. Law 6-67 (1985) and D.C. Law 7-18 (1987).

The constitutional, statutory and other provisions involved are reprinted in App. E at 58a.

STATEMENT

In recent years, this Court has been presented with an array of unique constitutional questions involving the federal separation of powers doctrine. Each of these cases involved a claim that one branch of the federal government impermissibly interfered with the constitu-

[1] Page citations to material printed in the Appendix appear as "——a."

[2] All references to the Metropolitan Washington Airports Act of 1986, Pub. L. 99-500, 100 Stat. 1783-373, reenacted in Pub. L. No. 99-591, 100 Stat. 3341-376 (codified at 49 U.S.C. §§ 2451-2461 (1988)) are cited to the relevant statutory section but omit repeated references to "49 U.S.C.".

tional powers of another branch of that government. In refereeing the relationship between coordinate federal branches, this Court has adopted a "flexible understanding of separation of powers," upholding innovative and workable solutions to the needs of practical government and approving schemes "that to some degree commingle the functions of the [b]ranches" so long as no one branch "undermine[s] the authority and independence of . . . another coordinate branch." *Mistretta v. United States*, 488 U.S. 361, 381-82 (1989). For example, in *Mistretta* this Court upheld the constitutionality of the United States Sentencing Commission, an independent body within the Judicial Branch composed of judges and others appointed by the President and charged with promulgating binding sentencing guidelines for federal offenders. This Court also upheld the Judicial Branch appointment of an independent counsel to investigate and prosecute alleged crimes by Executive Branch officials in *Morrison v. Olson*, 487 U.S. 654 (1988). In *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), this Court found a law allowing a federal agency to adjudicate state law counterclaims arising in connection with administrative proceedings to be constitutional.

This petition addresses yet another challenge on federal separation of powers grounds to a unique institution —this time a nonfederal entity created by the Commonwealth of Virginia and the District of Columbia. This Court has never held that such doctrine was applicable as a matter of federal law where (1) one branch of the federal government purportedly interferes with a branch of a state government, *see Kwai Chiu Yuen v. INS*, 406 F.2d 499 (9th Cir.), *cert. denied*, 395 U.S. 908 (1969), or for that matter, where (2) one branch of a state government interferes with another branch of that government. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981). The court below propels the federal separation of powers doctrine into seas un-

charted by this Court and applies such doctrine with a rigidity that conflicts with prevailing precedent.

A. Nature of the Case

Historically, commercial airports in the United States were operated by regional, state or local authorities except for Washington National Airport ("National") and Washington Dulles International Airport ("Dulles"). Those two exceptions were owned and operated by the federal government from the time they were built (in 1941 and 1962, respectively) until June 1987. Over the years, several attempts to transfer control of the airports to some type of local ownership had failed. Finally, in 1984 the Secretary of Transportation ("Secretary") appointed the broad-based Advisory Commission on the Reorganization of the Metropolitan Washington Airports (the "Holton Commission," named for its chairman, former Virginia Governor Linwood Holton). A consensus was reached on how best to balance the national, local, airport neighbor and user interests in the airports. *See* S. Rep. No. 193, 99th Cong., 1st Sess. 2 (1985). The Holton Commission recommended that the federally-owned Washington airports be leased as a unit to an independent regional authority that the Commonwealth of Virginia and the District of Columbia would establish.

To this end, the Commonwealth of Virginia enacted a law on April 3, 1985 creating a regional airport authority to acquire both National and Dulles from the federal government. 1985 Va. Acts ch. 598, App. E at 87a. The District of Columbia approved a substantially identical law on October 9, 1985. D.C. Law 6-67 (1985), App. E at 119a. The Virginia and D.C. statutes, consistent with the recommendations of the Holton Commission, established the Metropolitan Washington Airports Authority as a "public body corporate and politic" "independent" of all state and federal governmental bodies. *E.g.*, 1985 Va. Acts ch. 598, § 2 (89a). The two

jurisdictions empowered the Authority to acquire the airports from the federal government by lease and consented, subject to gubernatorial and mayoral approval, to lease conditions set forth by Congress "that are not inconsistent with [the state] Act." *Id.* § 3 (89a).

A year later, Congress essentially ratified the provisions that Virginia and the District of Columbia had enacted and authorized the transfer of the federal airports to the new regional authority in the Metropolitan Washington Airports Act of 1986 ("Transfer Act"), App. E at 60a; *see* S. Rep. No. 193, 99th Cong., 1st Sess. 12 (1985). The Transfer Act authorized the Secretary to negotiate a 50-year lease with the state-created Authority and directed that certain terms and conditions be incorporated in the lease. § 2454(a).

The Transfer Act, as provided in the Virginia and District statutes, required the lessee Authority to be independent of the federal, state and local governments. § 2456(b). The Authority was to have only those powers that the legislative authorities of Virginia and the District of Columbia conferred on it. § 2456(a). It was to be governed by an 11-member Board of Directors—five directors appointed by the Governor of Virginia, three by the Mayor of the District of Columbia, two by the Governor of Maryland, and one by the President of the United States with the advice and consent of the U.S. Senate. § 2456(e)(1). In recognition of the regional interests at stake, the Directors, except for the Presidential appointee, must reside within the Washington metropolitan area. § 2456(e)(2).

To accommodate the interests of nationwide users,[3] Congress provided that the nonfederal regional Authority,

[3] The Washington airports are, of course, used by citizens who travel from their home residences throughout the United States to the nation's capitol for business or pleasure. Among the more frequent users of Washington airports are Members of Congress who rely upon the availability of convenient air services to and

to be an eligible lessee, should create under state law a Board of Review. § 2456(f). The lessee Authority's Directors were to appoint the Board of Review from lists of Members of Congress on specified committees (except for one at-large member, chosen alternately from the House or Senate) that the Speaker of the House and President *pro tempore* of the Senate provide to the Directors. The Authority's Board of Directors has the right to reject any Member on the list and to request additional names. The Board of Review members that the Authority selects serve "in their individual capacities, as representatives of users of the Metropolitan Washington Airports." § 2456(f)(1). No Member of Congress from Virginia, Maryland, or the District of Columbia may serve on the Board of Review. *Id.* Certain specified actions of the lessee Authority's Board of Directors are to be submitted to the Board of Review at least thirty days before they are to become effective. § 2456(f)(4)(A).[4] An action will take effect unless the Board of Review disapproves it and

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from their home districts. *See, e.g., Proposed Transfer of Metropolitan Washington Airports: Hearings on H.R. 2337, H.R. 5040 and S. 1017 before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation,* 99th Cong., 2d Sess. 110 (1986) ("Members of Congress are heavy users of the air transportation system. Your busy schedules include many trips back to your districts. You depend on the ability to get to the airport quickly, to park quickly, to get to the airplane quickly.") (statement of Secretary Dole); 132 Cong. Rec. S3294 (daily ed. Mar. 25, 1986) ("I think any Senator who has gone through National Airport, and that is all of us in the last week or two, recognizes that something is seriously wrong with that airport.") (statement of Sen. Danforth).

[4] These actions include the authorization for the issuance of bonds; the adoption, amendment or repeal of a regulation; the adoption or revision of a master plan (including land acquisition proposals); and the appointment of a chief executive officer. § 2456(f)(4)(B). In addition, the adoption of an annual budget is to be submitted at least sixty days before it is to become effective. § 2456(f)(4)(A).

states reasons therefor within the specified time period. § 2456(f)(4)(C).

On March 2, 1987, the Secretary and the state-created Airports Authority completed negotiations and voluntarily entered into a lease (effective June 7, 1987) for the transfer of National and Dulles airports which incorporated, *inter alia*, provisions that are consistent with the Transfer Act. *See* Lease of the Metropolitan Washington Airports Authority, App. E at 163a.

Two days later, the Authority's Board of Directors adopted Bylaws pursuant to the Virginia and District of Columbia statutes. Those Bylaws authorized the Directors to establish a Board of Review and appoint thereto "representatives of the users of the Metropolitan Washington Airports who will serve in their individual capacities." Bylaws of the Metropolitan Washington Airports Authority, Art. IV, § 1 (Mar. 4, 1987), App. E at 151a. The Bylaws also set forth the powers of the Board of Review. *Id.* at §§ 4, 5, 6, 7 (153a-154a). Virginia and the District of Columbia expressly authorized the establishment of the Board of Review in amendments to the legislation that they originally passed authorizing the Airports Authority. These amendments were enacted by Virginia and the District of Columbia on April 8, 1987 and June 1, 1987, respectively. 1987 Va. Acts ch. 665, § 5.A.5 (111a); D.C. Law 7-18, § 3(c)(2) (1987) (143a).

By September 2, 1987, the Board of Directors had completed its review of the lists provided by the Speaker of the House and the President *pro tempore* of the Senate and appointed the nine members of the Board of Review. In the two resolutions appointing the Board of Review members, the Board of Directors fixed the terms of each of the appointments by a drawing, but reserved the right to remove a member of the Board of Review for cause prior to the conclusion of his or her term. *See* Res. No. 87-12 (June 3, 1987); Res. No. 87-27 (Sept. 2, 1978).

On March 13, 1988, the Authority's Board of Directors adopted a Master Plan for Washington National Airport. At its April 13, 1988 meeting, the Board of Review discussed the Master Plan and unanimously voted not to disapprove it.[5]

B. Proceedings Below

In November 1988, respondents brought this action seeking declaratory and injunctive relief against the Airports Authority and its Board of Review. Respondents claimed that they are injured by aircraft noise and safety problems allegedly caused by the implementation of a Master Plan for National that the Authority adopted and the Board of Review did not alter or disapprove. Respondents' lawsuit, however, is based not on environmental or safety statutes but on a challenge to the constitutionality of the Board of Review on federal separation of powers grounds. Cross-motions for summary judgment were filed.

On July 20, 1989, the district court (Judge Joyce Hens Green) rejected respondents' constitutional claims.[6] *Citizens for the Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airports Authority*, 718 F. Supp. 974 (D.D.C. 1989), App. C at 29a. The district court ruled that the Board of Review was not a federal entity, did not exercise federal power, had no members appointed or subject to removal by Congress and, therefore, presented no violation of separation of powers principles or of the Appointments, Incompatibility, or Ineligibility Clauses of the Constitution. Jurisdiction in the district court was based on 28 U.S.C. §§ 1331 and 1343. In a related case involving the identical constitutional claim in a different factual setting, the district court (Judge Louis F. Oberdorfer) also ruled in favor of the Authority. *See* Memorandum and Order, *Federal Firefighters Association, Local 1 v. United States*, Civil Action No. 88-1022-LFO (D.D.C. Oct. 11, 1989) ("the issue of constitutionality has been resolved at the district court level favorably to [the MWAA] by Judge Joyce Green's thorough opinion in *Citizens for the Abatement of Aircraft Noise v. MWAA* . . ."). App. D at 57a.

On appeal, a divided District of Columbia Circuit panel concurred with the district court's ruling on standing but reversed on the merits. The majority (Buckley, J. and Wald, C.J.) found that the Board of Review is in effect an agent of Congress and therefore cannot constitutionally exercise executive power. Judge Mikva dissented, stating that he would affirm the district court's decision and uphold "a delicately-balanced and innovative institution of federalism." (27a).

On December 6, 1990, the court of appeals stayed its mandate.

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[5] In only one instance has the Board of Review disapproved an action by the Board of Directors. On August 9, 1988, the Board of Review voted to disapprove a revision of the Authority's regulations that would permit temporary use of the Dulles Access Highway by high occupancy vehicles. The Board of Review expressed concern that "the use of the Access Highway by carpools, unrelated to airport use, is inconsistent with the purpose for which it was built, and is contrary to the interests of the users of the Airport." Res. No. BOR 88-1 (Aug. 9, 1988).

[6] The district court held, however, that respondents had standing, a holding which petitioners continue to challenge. Even if respondents were to prevail on the merits, the actions that respondents challenge neither caused their alleged injuries nor would the requested relief redress their alleged noise and safety concerns. *See infra* pp. 18-19.

REASONS FOR GRANTING THE WRIT

The decision below holds unconstitutional key provisions in a federal statute and, in so doing, invalidates a creative use of this nation's federalism to resolve successfully a long-festering regional transportation problem. In holding part of the governing structure of a state-created entity unconstitutional, the court below rejected the plain language of the statute and instead extended the federal separation of powers doctrine to functions performed by certain Members of Congress serving on a nonfederal board in their individual capacities as representatives of airport users. Such an approach constitutes an unprecedented intrusion of federal separation of powers doctrine into state activity. It further represents a sweeping, rigid and categorical application of that doctrine in conflict with the practical, functional analysis espoused by this Court. The decision, therefore, raises an important issue of first impression that this Court has not, but should, decide concerning the applicability of the federal doctrine of separation of powers to a nonfederal entity.

The decision also conflicts with Property and Spending Clause, appointment, removal and separation of powers decisions of this Court and other federal circuits, including the court of appeals for the Ninth Circuit. The court below failed to recognize that Congress' plenary powers under the Property Clause permit that body, under precedent of this Court, to induce the states indirectly to do certain things that Congress cannot do directly. Moreover, by its rigid extension of the federal separation of powers doctrine, the court below would prohibit Members of Congress from exercising executive functions in state-created agencies even though neither the Constitution nor this Court's jurisprudence prevent states from appointing individual Members to perform such functions. Indeed, such latitude was expressly contemplated by the Founding Fathers when they drafted the Incompatibility

and Ineligibility Clauses of the Constitution. The decision of the court below also fundamentally conflicts with the Appointments Clause decisions of this Court and the other federal circuits in concluding that persons that the nonfederal Airports Authority appointed to its Board of Review, which was created by state law, were nonetheless agents of Congress. Moreover, in finding that Congress could remove Review Board members, the court of appeals overlooked a rule of statutory construction originating at the founding of this country and adhered to consistently by this Court that, in the absence of express statutory language to the contrary, the power to remove is vested in the appointing authority.

Finally, the court of appeal's expansive view of standing erodes the "case or controversy" limitation that the Constitution places on the jurisdiction of the federal courts. The court below did not—and could not, given the record—find that respondents' alleged injury is fairly traceable to any challenged conduct of the Board of Review. Nor does the record support the court's assumption that a favorable ruling will redress any alleged injury.

If the court of appeals' holding is allowed to stand, the federal judiciary will cause serious disruption not only to the airports serving the nation's capitol but also to a unique nonfederal entity that the federal Executive and Congress, together with the executives and legislatures of Virginia and the District, have all approved and supported.

1. The court of appeals sought to determine whether the Board of Review, which the nonfederal Authority established and appointed, is a federal or nonfederal entity by asking whether the Board is "'exercising significant authority pursuant to the laws of the United States . . . .'" (10a) (*citing Buckley v. Valeo*, 424 U.S. 1, 126 (1976)). The court below reasoned that the Board of Review "exercises oversight responsibilities as a consequence of the [federal] Airports Act" (13a), apparently because the

composition and powers of the Board are set forth in that statute. Consequently, the court concluded that the Board wielded federal power within the meaning of *Buckley* and that federal separation of powers principles should apply. *Id.* This conclusion extends *Buckley* far beyond its intended reach and flagrantly ignores the plain language of the Transfer Act in disregard of this Court's mandate that statutes should be reasonably construed so as to save them from constitutional infirmities. *NLRB v. Catholic Bishop*, 440 U.S. 490, 499-501 (1979). Moreover, it disregards the findings of the district court that the Board of Review derives its existence and powers from state, not federal, law (specifically, the Authority's Bylaws); that the Board was established by the nonfederal Authority; and that its members are appointed and subject to removal by that nonfederal body, not Congress. (47a).

The Transfer Act provides that it is the "purpose of the Congress . . . to authorize the transfer of operating responsibility under long-term lease of the two Metropolitan Washington Airport properties as a unit, . . . to a properly constituted independent Airport Authority created by the Commonwealth of Virginia and the District of Columbia, in order to achieve local control, management, operation, and development of these important transportation assets." § 2452(a). That Act repeats that "[t]he Airports Authority shall be a public body corporate and politic, having the powers and jurisdiction as are conferred upon it jointly by the legislative authority of the Commonwealth of Virginia and the District of Columbia . . . ." § 2456(a). The Act further underscores that the Airports Authority shall be

> (1) independent of the Commonwealth of Virginia and its local governments, the District of Columbia, and the Federal Government; and
>
> (2) a political subdivision constituted solely to operate and improve both Metropolitan Washington Airports as primary airports serving the Metropolitan Washington area.

§ 2456(b). Congress could not have been clearer in its intent to allow Virginia and the District to create an independent, nonfederal entity. *See Burlington N.R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) ("'[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete.'") (citation omitted).

The court below does not even mention these statutory provisions. It does acknowledge "that Virginia and the District of Columbia could have walked away from the deal offered by Congress, . . ." (11a), but it fails to recognize the significance of this observation. In concluding that "once the deal was accepted, it is federal law that resulted in the establishment of the Board of Review . . ." (12a), the court overlooks the independent status and actions of Virginia, the District, and the nonfederal Authority. *See supra* pp. 4-5, 7-8. Contrary to the court of appeals' analysis, the Transfer Act did not create or empower the Board of Review. The Review Board is a creature of state law and its powers are set forth in the Authority's Bylaws, which the Directors adopted. (153a-154a). The Authority's obligation to establish such a Board is at most contractual, reflecting a condition in the lease negotiated between the Secretary and the Authority. (175a-176a). Virginia and the District freely and voluntarily entered into the arms-length agreement with the Secretary. They could have rejected the offer of a lease (particularly one that requires them to pay at least $3 million annually in addition to a $23.6 million initial payment to the Civil Service Retirement and Disability Fund). Their legislative bodies could have refused to pass legislation authorizing the Board of Review. As Judge Mikva observed in his dissent, "[t]he fact that the federal Act authorizing the transfer of the airports to the Authority contemplates the Board's creation does not alter the Board's fundamental state parentage." (22a).

If it were true that the Board of Review wields federal power because Congress described its composition and authority, then the Airports Authority's Board of Directors, which no one challenges, arguably stands on no different footing. Indeed, the court of appeals' expansive logic would federalize any state-created or non-federally created entity that was patterned after a suggestion or condition in a federal statute. Such reasoning denigrates the role of the states as partners in our federal system, able to accept or reject federal conditions on the basis of independent political decisionmaking. It further could raise wholly unanticipated federal obligations and liabilities and impede Congress' ability to encourage states to follow a federal model.

2. No party or court has questioned that Virginia and the District of Columbia could have agreed to create the Authority and its Board of Review as currently structured. *See, e.g.*, Brief for Appellants (Dec. 1, 1989) ("App. Br.") at 39. Moreover, there is no constitutional difference between states (or a state and the District) voluntarily compacting to do something that is constitutional and Congress requesting the states to so act in order to become eligible for the transfer of federal property. Yet the court below strained to create such a constitutional difference and in doing so misinterpreted this Court's decision in *South Dakota v. Dole*, 483 U.S. 203 (1987).

South Dakota establishes that an "independent constitutional bar" on direct congressional action is not "a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly." 483 U.S. at 210. Thus, the court of appeals acknowledged that although the Twenty-first Amendment prohibits Congress from legislating in certain ways with respect to intoxicating liquors, the states could "help Congress achieve objectives beyond its immediate constitutional reach by agreeing themselves to legislate in areas where

they constitutionally can legislate, but Congress cannot." (14a). But the court below erroneously concluded that the logic of *South Dakota v. Dole* does not apply here (*id.*), although the circumstances are fundamentally the same.

In the present case, the court assumed that federal separation of powers principles similarly constrained Congress from doing certain things directly, such as appointing Members of Congress to a Board of Review. However, a state-created entity is free to create a Board composed of Members of Congress because nothing in the Constitution prohibits states from appointing individuals who are Members of Congress to positions created by state law. *See Signorelli v. Evans*, 637 F.2d 853, 861-62 (2d Cir. 1980); II *Elliot's Debates*, vol. 5 at 127, 378, 420-25, 503, 505-06 (2d ed. 1836). In holding that Congress may not use "the same device" that this Court approved in *South Dakota* "to circumvent the functional constraints placed on it by the Constitution," (14a), the court arbitrarily elevates certain constitutional constraints above others, essentially creating a two-tiered Constitution. Apparently functional separation of powers constraints, only implicit in the Constitution, loom larger than other prohibitions, such as the express terms of the Grand Jury Clause of the Fifth Amendment or the Twenty-first Amendment, that the Constitution may place on Congress' powers.

This Court should not accept this proposed exception to the reasoning in *South Dakota v. Dole*. The issue is not whether Congress cannot do something because that power is not found in—or is prohibited by—one constitutional provision rather than another. The issue is whether Congress can induce the states to do something voluntarily that everyone concedes that the states themselves have the power to do. The constitutional limit recognized in *South Dakota* is that Congress may not induce the states to engage in activities that *states* could not constitutionally

perform (such as to discriminate on the basis of race in administering the Airports Authority). 483 U.S. at 210. But such prohibitions are not implicated here. The decision of the court of appeals places an unwarranted limitation on the *South Dakota* decision and leaves Congress guessing as to which constitutional prohibition may be deemed so important as to invalidate its legitimate efforts to achieve indirectly objectives that it may not achieve directly.[7]

3. The court of appeals' conclusion that the Board of Review created by the independent Authority is nonetheless a federal legislative agent impermissibly performing executive functions (18a-19a) rests on a misapplication of this Court's appointment and removal cases. The court below found that *Bowsher v. Synar*, 478 U.S. 714 (1986) and *Mistretta v. United States*, 488 U.S. 361 (1989), which clearly govern this case, were "unpersuasive." (17a). That court's reasoning, if left undisturbed, will confuse appointment and removal law that this Court has clarified and will limit Congress' legitimate discretion to provide its own views (or authorize others to provide their views) in the appointment process.

The court below did not find that Congress appointed anyone. In fact, the Governors of Maryland and Virginia, the Mayor of the District of Columbia and the President of the United States appoint the Directors of the Authority. These nonfederal Directors in turn appoint the members of the Board of Review from lists of names (which

[7] Indeed, although the court below stated that it need not reach the respondents' Ineligibility and Incompatibility Clause claims (19a), the majority's holding that individual Members of Congress could not perform executive functions in fact added additional constraints to those Clauses that the Founding Fathers deliberately avoided placing on our constitutional and federal system. Nothing in either of those Clauses prohibits an individual Member from serving in any state-created office (including one in which executive functions are vested) or as a member of a public corporate body independent of the federal government. *See* U.S. Const. art. I, § 6, cl. 2.

the Directors are free to reject) that are submitted by the Speaker of the House and the President *pro tempore* of the Senate. In *Bowsher*, this Court did not condemn the congressional requirement that the Speaker of the House and the President *pro tempore* of the Senate recommend a list of three individuals to the President from whom he nominates the Comptroller General. 478 U.S. at 727. Similarly, this Court upheld Congress' power to require the President to appoint three judges to the Sentencing Commission from a list of six judges recommended by the Judicial Conference of the United States. *Mistretta*, 488 U.S. at 410 n.31. There is no principled distinction between these situations and the present case.

The court below erred in finding *Mistretta* inapposite and erected a constitutional distinction where none exists. The court of appeals believed that *Mistretta* offered no guidance because it involved potential Executive interference with the Judiciary (or vice versa) rather than congressional interference with executive powers. (19a). But there is no basis for analyzing alleged interference with executive appointment powers differently depending on whether a proposed list comes from Congress or from the Judiciary. The interference, if any, that may be inherent in allowing the congressional or judicial branches to submit lists of nominees to an executive appointing authority is constitutional so long as the appointing authority retains ultimate responsibility in the selection of its appointees.

Further, the court of appeals' holding, in reliance on *Bowsher*, that Congress has the power to remove members of the Board of Review (18a) is unsupported by either the facts or the law. Nothing in the Transfer Act authorizes Congress to interfere with the Authority's power to remove its appointed officials. Even appellants concede that the absence of any congressional removal power "eliminates one source of unconstitutionality." *See* App. Br. at 35. The law, articulated by Madison, is that "the

power of removal result[s] by a natural implication from the power of appointment." 1 Annals of Cong. 496 (J. Gales ed. 1789). The Authority properly recognized that removal authority is vested in the appointing authority in the absence of express legislation to the contrary in Resolutions Nos. 87-12 and 87-27, which empowered the Board of Directors to remove members of the Board of Review for cause. The Board of Directors' authority to remove its appointees—the Board of Review—is thus consistent with a longstanding principle of federal law that this Court repeatedly has affirmed, *see Carlucci v. Doe*, 488 U.S. 93, 99 (1988); *Myers v. United States*, 272 U.S. 52, 119 (1926), and with relevant state law. *See, e.g.*, Va. Code Ann. 24.1-79.6. Contrary to the court of appeals' conclusion (18a-19a), this case is wholly unlike *Bowsher v. Synar*, where this Court found Congress' power to remove an officer charged with execution of the law unconstitutional.

4. Even if, contrary to the facts, the Board of Review were an agent of Congress, it would not be interfering with a coordinate branch of the federal government here. At most (if it were ever to disapprove an action of the Authority's Directors that also caused injury to some private party, which is not the case here), it would be trenching on the powers of a nonfederal entity in circumstances where the relevant state and local governments had given their consent. To condemn such action under the rubric of the judicially-developed federal doctrine of separation of powers would conflict with *Kwai Chiu Yuen v. INS*, 406 F.2d 499 (9th Cir.), *cert. denied*, 395 U.S. 908 (1969). That case holds that the federal separation of powers doctrine "has no application in the area of federal-state relations." *Id.* at 501.[8]

5. No findings supported the district court's conclusion, adopted by the court below (9a), that ripeness was

[8] Neither respondents nor the court of appeals cited specific case law to the contrary to support their view that federal separation of powers principles apply in this case.

established here because the case "is as ripe as it will ever be." (38a). A case can be almost ripe forever and never amount to a case or controversy for purposes of judicial intervention. *See Clark v. Valeo*, 559 F.2d 642, 649 (D.C. Cir.) (*en banc*), *aff'd without opinion*, 431 U.S. 950 (1977). Here, the Board of Review has never taken any action that affects the claims alleged by respondents. Particularly in a case of first impression where respondents ask the judiciary to upset on constitutional grounds the delicate balance wrought by both federal and state legislators and executives, *see Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981), a court should not rest on mere speculation.

Further, the district court, as affirmed by the court of appeals (9a), found only (without evidentiary hearing and despite petitioners' protests) that respondents' alleged injuries are "fairly traceable" to the Master Plan (41a). It did not find that those alleged injuries could be traced to the mere existence of the Board of Review, which took no action that affected the Master Plan in any respect. Yet it is only the Board of Review and not the Master Plan that respondents have challenged.

Nor did the district court or the court of appeals adequately address the essential link between the complained of injury and the relief requested. Eliminating the Board of Review (and all the consequences of that action) simply would not redress their injuries by reducing aircraft noise or promoting safety. *See, e.g.*, § 2454 (c)(5)(C); Brief for Defendants (Jan. 30, 1989), Exh. 8.

The unprecedented approach of the court of appeals would extend separation of powers principles to nonfederal entities in a rigid categorical manner, contrary to the functional analysis adopted by this Court and in conflict with well-established appointment and removal law. *See, e.g., Mistretta*, 488 U.S. at 380-84, 408-410; *United States ex rel. Stillwell v. Hughes Helicopters*,

Inc., 714 F. Supp. 1084, 1086-87 (C.D. Cal. 1989). Unless reversed, the decision will hamper the ability of the federal government to work with state and local entities to solve regional problems and will unduly constrain Congress in disposing of federal assets consistent with the Property Clause.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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